Petition

Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

81-1755

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

JOSEPH M. DOLLAR,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

SAMMY J. HAWKINS
Attorney for Petitioner
Suite 577, FNB Bldg.
100 Cherokee Street
Marietta, Georgia 30060
(404) 422-5059

QUESTION PRESENTED

Whether a criminal offense punishable by imprisonment for up to one year and a $1,000 fine is an offense which an accused has a right to a jury trial under the Sixth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED 2

STATEMENT 4

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 5

REASONS FOR GRANTING THIS WRIT:

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A CRIMINAL OFFENSE PUNISHABLE BY IMPRISONMENT FOR UP TO ONE YEAR AND A $1,000 FINE IS AN OFFENSE WHICH AN ACCUSED HAS A RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION 6

II. THE COURT OF APPEALS OF GEORGIA HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT 8

CONCLUSION 9

TABLE OF AUTHORITIES CITED

Page

Cases:

Baldwin v. New York, 399 U.S. 66 (1970) 6, 8

Cheff v. Schnackenberg, 384 U.S. 373 (1966) 8

District of Columbia v. Clawans, 300 U.S. 617 (1937) 7, 8

Duncan v. Louisiana, 391 U.S. 145 (1968) 6, 7, 8

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 8

Frank v. United States, 395 U.S. 147 (1969) 8

Statutes:

Ga. Code Ann. § 27-2506 ..... 3, 6

Ga. Code Ann. § 1-806 2

Ga. Code Ann. § 1-815 2

United States Constitution, Sixth and Fourteenth Amendments 2, 3

Codes:

City of Marietta Code § 2-4010 3

Ordinances:

Animal Control Ordinance of Cobb County § 9 3

Animal Control Ordinance of Cobb County § 28 .... 4, 6

APPENDIX

Opinion of the Court of Appeals of Georgia 1a-2a

Order denying Motion for Rehearing 1b

Order denying Petition for Writ of Certiorari 1c

Order of the trial court 1d-6d

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

JOSEPH M. DOLLAR,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Joseph M. Dollar, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in the above-entitled case on November 19, 1981.

OPINION BELOW

The opinion of the Court of Appeals of Georgia is unreported and is printed in Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on November 19, 1981, and is printed in Appen-

dix A, *infra*. A motion for rehearing was timely filed and denied on December 18, 1981, and the denial is printed in Appendix B, *infra*. Thereafter, on January 28, 1981, the Supreme Court of Georgia denied a timely filed petition for writ of certiorari, and the denial is printed in Appendix C, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States:

ARTICLE VI, Georgia Code Ann. § 1-806. TRIAL IN CRIMINAL CASES, AND RIGHTS OF A DEFENDANT.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARTICLE XIV, Georgia Code Ann. § 1-815. CITIZENSHIP.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. This case involves the following provision of the Georgia Code:

Georgia Code Ann. § 27-2506. MISDEMEANORS, HOW PUNISHED.

> Except where otherwise provided, every crime declared to be a misdemeanor shall be punished either: (a) By a fine not to exceed $1,000 or by confinement in the county or other jail, county correctional institution or such other places as counties may provide for maintenance of county prisoners for a total term not to exceed 12 months, either a fine or confinement or both; or,
>
> * * * *

3. This case involves the following provision of the City of Marietta Code:

Section 2-4010. DOG CONTROL, CONTRACT WITH COUNTY.

> The city manager, with the consent of the city council shall contract with the county for dog control within the city. This shall include the enforcement of the county "animal control law" within the city. (R. 17).

4. This case also involves the following provisions of the Animal Control Ordinance of Cobb County:

Section 9. CONTROL OF ANIMALS.

(a) It shall be unlawful for the owner of any animal

to permit such animal to be out of his immediate control and restraint, or to be left unattended off the premises of the owner, or to be upon property of another person without the permission of the owner or person in possession of such other property. * * * * (R. 22).

Section 28. VIOLATION.

Any violation of this Ordinance shall be punished as for a misdemeanor under the laws of this State. Each day's continuing violation shall be treated as a separate offense (R. 30).

* * * *

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Court of Appeals of Georgia, entered on November 19, 1981, affirming the trial court's denial of petitioner's right to a jury trial.

This case arose when Officer Sharpton of the Cobb County Rabies Control charged petitioner with the offense of Dog Loose and Unattended in violation of § 2-4010 of State Law, Local Ordinance (R. 5).

The petitioner appeared in the Marietta Recorder's Court on December 16, 1980, as ordered by the summons (R. 5). At that time, the petitioner demanded a jury trial (R. 12, 34) and he was bound over to the State Court of Cobb County (R. 6) where he was given a notice to appear in the State Court of Cobb County on March 13, 1981 for arraignment (R. 7).

The petitioner appeared in the State Court of Cobb County on March 4, 1981, waived formal arraignment and demanded a jury trial (R. 8).

The State of Georgia filed its accusation in the clerk's

office on March 12, 1981 (R. 9-11) and the State of Georgia contemporaneously therewith filed its motion to remand this case to the municipal court (R. 12). The State of Georgia contended that the petitioner has no right to a jury trial for violation of a municipal ordinance (R. 12).

The petitioner and his counsel appeared in the State Court of Cobb County on March 25, 1981, as directed, to oppose the motion to deny the petitioner a jury trial. The petitioner contended in the trial court that he has a right to a jury trial under the Sixth Amendment to the United States Constitution. During the hearing, the petitioner introduced into evidence a certified copy of the City of Marietta Code and a certified copy of the Animal Control Ordinance of Cobb County (R. 15-30).

The trial court entered its Order on April 15, 1981, printed in Appendix D, *infra*, granting the State of Georgia's motion to deny petitioner a jury trial and to remand this case to the Marietta Recorder's Court (R. 34-38) (Appendix D). Also, on April 15, 1981, the trial court granted petitioner a certificate of immediate appeal (R. 4), and on May 6, 1981, the Supreme Court of Georgia granted petitioner's application for interlocutory appeal, but ordered that the notice of appeal be directed to the Court of Appeals of Georgia (R. 3).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The trial court held that the petitioner is not entitled to a jury trial (R. 38) (Appendix D). In the Court of Appeals of Georgia, petitioner's Enumeration of Error Number I asserted that "The trial court erred in holding that the Appellant is not entitled to a jury trial." The

petitioner stated in his brief in the Court of Appeals of Georgia that one of the issues in the case sub judice is "Whether an accused charged with violation of the 'Animal Control Ordinance of Cobb County', which provides for misdemeanor punishment, has a right, under the Sixth Amendment to the United States Constitution, to a jury trial." This issue was briefed and rejected by the Court of Appeals of Georgia. (Appendix A). Petitioner again raised the issue of petitioner's right to a jury trial in his motion for rehearing, but his motion was denied.

REASONS FOR GRANTING THIS WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A CRIMINAL OFFENSE PUNISHABLE BY IMPRISONMENT FOR UP TO ONE YEAR AND A $1,000 FINE IS AN OFFENSE WHICH AN ACCUSED HAS A RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This case presents for review an issue expressly answered in *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886 (1970).

Section 28 of the Animal Control Ordinance of Cobb County provides that violations thereof are punishable as misdemeanors. Georgia Code Ann. § 27-2506 provides that a misdemeanor is punishable by a sentence not to exceed twelve months and a $1,000 fine.

Because a jury trial is guaranteed only where a "serious" offense is charged, it becomes necessary to distinguish between "serious" and "petty" (non-serious) offenses. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968).

"But the *penalty authorized* for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). The *penalty authorized* by the law of the *locality* may be taken 'as a gauge of its social and ethical judgments,' 300 U.S. at 628, 57 S.Ct. at 663, of the crime in question. In *Clawans* the defendant was jailed for 60 days, but it was the 90-day *authorized punishment* on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury. In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury." (Emphasis supplied.) *Duncan* at 159, 88 S.Ct. at 1453.

"In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine." *Duncan* at 161, 88 S.Ct. 1453.

"Thus the task before us in this case is the essential if not wholly satisfactory one, see *Duncan*, at 161, 88 S.Ct. at 1453, of determining the line between 'petty' and 'serious' for purposes of the Sixth Amendment right to jury trial.

"Prior cases in this Court narrow our inquiry and furnish us with the standard to be used in resolving this

issue. In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense (misdemeanor in this case), *District of Columbia v. Clawans*, 300 U.S. 617, 628, 57 S.Ct. 660, 663, 81 L.Ed. 843 (1937), and we have found the most relevant such criteria in the severity of *maximum authorized penalty* (twelve months and a $1,000 fine in this case). *Frank v. United States*, 395 U.S. 147, 148, 89 S.Ct. 1503, 1505, 23 L.Ed. 162 (1969); *Duncan v. Louisiana*, *supra*, 391 U.S., at 159-161, 88 S.Ct., at 1452-1454; *District of Columbia v. Clawans*, *supra*, 300 U.S., at 628, 57 S.Ct., at 663. Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as 'petty,' *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1532, 16 L.Ed.2d 629 (1966), but that a two-year maximum is sufficiently 'serious' to require an opportunity for a jury trial, *Duncan v. Louisiana*, *supra*. *The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is.* More specifically, we have concluded that no offense can be deemed 'petty' for purposes of right to trial by jury where imprisonment for more than six months is *authorized.*" (Emphasis supplied.) *Baldwin v. New York*, 399 U.S. 66, 68-69, 90 S.Ct. 1886, 1888.

II.

THE COURT OF APPEALS OF GEORGIA HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The opinion of the Court of Appeals of Georgia is

clearly in conflict with *Baldwin v. New York*, *supra*, and *Duncan v. Louisiana*, *supra*. Therefore, it is necessary for the Supreme Court of the United States to step in and order that the Court of Appeals of Georgia follow its decisions in *Baldwin* and *Duncan*.

CONCLUSION

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we believe that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. Since we consider this appeal to be such a case, we believe that the Constitution was violated when petitioner's demand for jury trial was refused. *Duncan v. Louisiana*, *supra*.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ SAMMY J. HAWKINS

SAMMY J. HAWKINS
Attorney for Petitioner

Suite 577, FNB Bldg.
100 Cherokee Street
Marietta, Georgia 30060

(404) 422-5059

CERTIFICATE OF SERVICE

I, SAMMY J. HAWKINS, hereby certify that I have served three copies of the Petition for Writ of Certiorari to the Court of Appeals of Georgia in the above case on counsel for the respondent by depositing the same in the United States mail, first-class mail, postage prepaid, properly addressed as follows:

Hon. Michael J. Bowers	Mr. Charles S. Hunter
Attorney General	Assistant Solicitor
State of Georgia	State Court of Cobb County
132 State Judicial Bldg.	P. O. Box 649
Atlanta, Georgia 30334	Marietta, Georgia 30061

All parties required to be served have been served.

This 19th day of March, 1982.

/s/ SAMMY J. HAWKINS
SAMMY J. HAWKINS

APPENDICES

APPENDIX A

COURT OF APPEALS OF GEORGIA

62435. DOLLAR V. THE STATE. P-154

OPINION—NOVEMBER 19, 1981

POPE, JUDGE.

Appellant was charged with violating the dog control ordinance for the City of Marietta. The case was bound over from the municipal court to the State Court of Cobb County. The state court judge remanded the case to the municipal court upon the grounds that such a transfer by the municipal court was improper in the present case. It is from the order of the state court from which appellant brings this interlocutory appeal.

Under the provisions of the charter for the City of Marietta the municipal court judge has the power "(i)n cases where it is made to appear that a *State* law has been violated to bind the offender over to the proper court for trial." (Emphasis added) Art. VI, § 6.3 (4) (Ga. L. 1977, pp. 3541, 3586). The alleged actions of the appellant in permitting his dog to be loose and unattended constitute a violation of the local dog control ordinance but do not constitute a violation of any state law. Compare Ga. Code Ann. § 62-2001 et seq., Code Ann. § 62-9928. Also see generally *Diamond v. State*, 151 Ga. App. 690 (261 SE2d 434) (1979), *State v. Burroughs*, 244 Ga. 288, 291 (260 SE2d 5) (1979) majority vacated 448 U. S. 903, (100 SC 3044, 65 LE2d 1134), on remand dissent adopted 246 Ga. 393 (271 SE2d 629) (1980). Therefore the municipal court judge erred in binding the case over to the state court for disposition. The enforcement of the ordinance and punishment thereunder is governed by the provi-

sions of the city charter and the municipal court is the proper forum for the adjudication of this issue.

The dog control ordinance adopted by the city in the present case provides that a violation thereof is punishable as a misdemeanor. Georgia Code Ann. § 27-2506 provides that a misdemeanor is punishable by a sentence not to exceed twelve months. Thus, the penalty provided in the ordinance would appear to be greater than the sentence which the city is empowered to impose. (Ga. L. 1977, p. 3541, as amended 1978, p. 3782). Despite this apparent ambiguity, the maximum punishment which may be imposed by the City of Marietta for a violation of its ordinance prohibiting loose and unattended dogs is the maximum allowable under the city charter, which is 30 days public work, $1000.00 fine, 60 days in jail or a combination thereof. Compare People v. Gerus, 69 NYS2d 283 (1942). Further the State Court of Cobb County lacks jurisdiction over the enforcement of this municipal ordinance. The jurisdiction of the state court includes "misdemeanor cases." (Ga. L. 1964, p. 3211). However, this refers only to state statutes, the violation of which constitutes a misdemeanor and does not include a city ordinance even though the punishment thereunder may be partially within the range of punishment for a misdemeanor established by state law.

For these reasons we conclude that the state court acted properly in remanding the present case to the municipal court for disposition. Appellant's enumerations of error are without merit.

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, December 18, 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

62435 Joseph M. Dollar v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Note: New opinion was written on motion for rehearing.

Please destroy old opinion and substitute with new one. *Judgment remains the same.*

COURT OF APPEALS
OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA December 18, 1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta January 28, 1982

Case No. 38371. Dollar v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX D

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA
v.
JOSEPH M. DOLLAR } CASE NO. 80M7863

ORDER

The above-styled case having come on for hearing before this Court on the State's Motion to Remand Case to Municipal Court, after hearing and oral argument and a review of all matters on file, the following is hereby ordered:

1.

This case originated in the Recorder's Court of the City of Marietta, but was bound over to this Court upon the Defendant's demand for jury trial. The State filed an accusation based on Defendant's alleged violation of a Marietta dog control municipal ordinance, subject to decision on this motion. The State contends that the Defendant is not entitled to a jury trial, and further, that this Court does not have subject matter jurisdiction of this case.

2.

The threshold question to be determined is whether the State Court of Cobb County has subject matter jurisdiction over municipal ordinance violations. 1964 Ga. Laws, p. 3211, as amended, which creates this Court, provides that the "Court shall have jurisdiction to try and dispose of all civil and misdemeanor cases". The question thus presented is whether violation of a municipal ordinance

constitutes a misdemeanor. In *Pearson v. Wimbush*, 124 Ga. 701, 52 S.E. 751 (1906) the Supreme Court determined that there is a distinction between offenses against the laws of the state and offenses against the ordinances of a city. Additionally, the Court found that while violation of a municipal ordinance is a crime as is a violation of the penal laws of this state, it cannot be punished by a sentence "similar in its nature and character to that imposed for misdemeanors against the state." 52 S.E. at 756. The Court placed municipal ordinance violations in a category apart from misdemeanors, deeming them different from violations of state law. The distinction between misdemeanors and municipal ordinance violations is further illustrated by the Uniform Rules of the Road (Ga. Code Ann. §68A-101, *et seq.*) where it is specifically stated that a local traffic ordinance violation could be charged as a violation of Title 68A (Ga. Code Ann. §68A-1507) which is a misdemeanor (Ga. Code Ann. §68A-102). This further shows that municipal ordinance violations are not within the category of misdemeanors.

As this Court's jurisdiction in criminal matters extends only to misdemeanors, it must be concluded that it does not have jurisdiction over municipal ordinance violations, except as specifically permitted under state law.

3.

Having determined that it does not have subject matter jurisdiction over this case, the Court must now determine its disposition. The Defendant has demanded a jury trial, and since the Superior Court is a court of general jurisdiction, it would be the proper court for a jury trial of this case if one is required by law.

Georgia courts have "consistently held that the constitutional guarantee of a right to a trial by a jury does not

extend to one charged in a municipal court with violation of a municipal ordinance." *Key v. Stewart*, 228 Ga. 516, 186 S.E.2d 739 (1979). The protection afforded by our state constitutional provision that the right to a jury remain inviolate extends only to those instances where jury trial existed when:

> Georgia became an independent state and a part of the United States except as modified in the present Constitution . . . As was said by Jackson, C.J., in Hill v. Dalton, 72 Ga. 319, 'such [provision has] never been held to apply to police of cities and towns and arrests and trial, with fine and imprisonment therein, under ordinances thereof' . . . Municipal offenses usually are confined to breaches of by-laws and ordinances which in their nature are mala prohibita, and which by legislative sanction have been enacted by the municipality for its health, peace, and tranquility. The offenses are petty in their nature, and in this state have always been prosecuted without a jury.

Pearson v. Wimbush, 124 Ga. 701, 52 S.E. 751 (1906).

This principle has been followed by the federal courts as well. In *Duncan v. Louisiana*, 391 U.S. 161 (1968), the Supreme Court recognized that petty offenses have always been held to be exempt from the Sixth Amendment's jury trial requirement as "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." 391 U.S. at 160. However, where conviction of an offense authorizes imprisonment for more than six months, the Supreme Court of the United States had held that it cannot "be deemed 'petty' for purposes of the right to a jury trial." *Baldwin v. New York*, 399 U.S. 66 (1970).

4.

In *Baldwin*, the Supreme Court determined that "where the accused cannot possibly face more than six month's imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." 399 U.S. at 73. Section 6.3 (2) of the Charter of the City of Marietta (1977 Ga. L., p. 3541) as amended (1978 Ga. L., p. 3782) provides that the City's municipal court may sentence an offender as follows:

> (2) Upon conviction, to sentence any offender to labor upon the streets or public works in said city for a period not exceeding thirty (30) days; to impose a fine not exceeding one thousand dollars ($1,000.00) or to sentence said offender to be confined in the jail or other place of imprisonment in the county not exceeding sixty (60) days, either one or more of said penalties.

This provision clearly limits the authority of the municipal judge to sentence offenders to terms far below the line drawn by the Supreme Court in *Baldwin, supra.*

The City Charter also provides at §2.16(44) that the city council can regulate the keeping or running at large of animals and at §2.16(41) that it may adopt codes of any federal or state government or agency. The City has exercised this grant of power at §2-4010 of its Code wherein it is stated:

> The city manager, with the consent of the city council shall contract with the county for dog control within the city. This shall include the enforcement of the county "animal control law" within the city.

The Cobb County Animal Control Ordinance provides at §28 that violations thereof are punishable as misdemeanors. Ga. Code Ann. §27-2506 provides that misdemeanors

are punishable by sentences not to exceed twelve months. The Defendant has not raised this issue but it appears that the City is seeking to enforce an ordinance with penalties beyond the scope of its authority, as "The powers which a city government may lawfully exercise must be derived from its charter or the general laws of this State' . . . and it is well settled that all municipal charters are strictly construed." *City of Midway v. Midway Nursing and Convalescent Center, Inc.*, 230 Ga. 77, 195 S.E.2d 452 (1973). "Municipalities are creatures of the legislature. They possess only such powers as are expressly delegated to them by the legislature. They possess no inherent powers." *Kochler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972).

Neither the general legislation applicable to municipal corporations (Ga. Code Title 69) nor Charter of the City of Marietta give the city authority to provide for penalties beyond those previously quoted. Therefore, the Court has concluded that since the Defendant could not be sentenced for violation of the City of Marietta ordinance to the extent permitted under the Cobb County Animal Control Ordinance, he is not entitled to a jury trial.

5.

Having decided that the Defendant is not entitled to a jury trial and that the action of the Recorder, City of Marietta, in binding the above referenced matter over to this Court for trial is a nullity and, therefore, void, in that this Court lacks subject matter jurisdiction, *Champion v. Rakes*, 155 Ga. App. 134, 270 S. E. 2d 272 (1980), now, therefore, it is CONSIDERED, ORDERED AND ADJUDGED THAT:

a. The State's motion is meritorious and this matter is remanded to the Recorder's Court of Marietta for further proceedings;

b. The Defendant be and is hereby remanded to the Recorder's Court of the City of Marietta to answer to the offense of "Dog Loose and Unattended (2-4010)" at the next appearance day of said Court and that his personal recognizance be transferred to said Court for his appearance from day to day until said case is disposed of; and,

c. The Clerk of this Court is to forward to the Clerk of the Recorder's Court of the City of Marietta a copy of this Order and all other matters on file.

SO ORDERED this 14th day of April, 1981.

/s/ TOM CAUTHORN
TOM CAUTHORN, Judge
State Court of Cobb County

Opposition

Office - Supreme Court
FILED
JUN 28 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH M. DOLLAR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia correctly concluded that the State Court of Cobb County, which Court lacked subject matter jurisdiction, acted properly in remanding the present case back to the Municipal Court of the City of Marietta for disposition as the latter Court properly possessed subject matter jurisdiction over violations of municipal ordinances in the City of Marietta?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT:

1. THE COURT OF APPEALS OF GEORGIA CORRECTLY CONCLUDED THAT THE STATE COURT OF COBB COUNTY, WHICH COURT LACKED SUBJECT MATTER JURISDICTION, ACTED PROPERLY IN REMANDING THE PRESENT CASE BACK TO THE MUNICIPAL COURT OF THE CITY OF MARIETTA FOR DISPOSITION AS THE LATTER COURT PROPERLY POSSESSED SUBJECT MATTER JURISDICTION OVER VIOLATIONS OF MUNICIPAL ORDINANCES OF THE CITY OF MARIETTA 9

CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Baldwin v. New York, 399 U.S. 66 (1970)	11,13
Duncan v. Louisiana, 391 U.S. 161 (1968).	11,12
Key v. Stewart, 288 Ga. 516, 186 S.E.2d 739 (1979)	11
Pearson v. Wimbush, 124 Ga. 701, 52 S.E. 751 (1906)	11,15,16
State v. Millwood, 242 Ga. 244, 248 S.E.2d 643 (1978). . .	15,16
STATUTES:	
Ga. Laws 1977, p. 3541, as amended, Ga. Laws 1978, p. 3782 .	4,5,6,10
Ga. Laws 1974, p. 3211	7
Ga. Code Ann. § 27-2506	7
Code, City of Marietta § 2-4010 .	5

No. 81-1755

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JOSEPH M. DOLLAR,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner was summoned to appear in the City of Marietta Municipal Court on December 16, 1980 on a charge of violating the City's Dog Control Ordinance. Upon his appearance Petitioner requested a trial

by jury. In response to Petitioner's request the Municipal Court Judge bound the case over to the State Court of Cobb County where Petitioner was given notice to appear on March 13, 1981 for arraignment.

Petitioner appeared in the State Court of Cobb County on March 4, 1981, waived formal arraignment and requested a trial by jury. On March 12, 1981 the State of Georgia filed its accusation along with a motion to remand the case to the Marietta Municipal Court for disposition. The State Court entered its order on April 15, 1981 granting the State's motion to remand. Additionally, the State Court granted Petitioner a certificate of immediate appeal.

On May 6, 1981 the Supreme Court of Georgia granted Petitioner's application for interlocutory appeal. The Supreme Court of Georgia, however, ordered that notice

of appeal be directed to the Court of Appeals of Georgia.

On November 19, 1981 the Court of Appeals of Georgia concluded that the State court acted properly in remanding the case to the Marietta Municipal Court for disposition. Petitioner's subsequent petition for a writ of certiorari to the Supreme Court of Georgia from the adverse decision of the Court of Appeals of Georgia was denied on January 28, 1982 with all justices concurring.

From the denial of relief in the state courts Petitioner has pursued this instant petition for a writ of certiorari to be directed to the Court of Appeals of Georgia.

(ii)

Under the laws of the State of Georgia there is established a City

Charter for the City of Marietta. (Ga. Laws 1977, p. 3541). Through this charter the Georgia General Assembly has provided for the establishment of a Municipal Court in the City of Marietta with jurisdiction over all violations against the laws and ordinances of that city. (Ga. Laws 1977, pp. 3541, 3585, § 6.1). In addition, the charter of the City of Marietta provides that it shall be the duty of the Municipal Court judge:

> Upon conviction, to sentence any offender to labor upon the streets or public works in such City for a period not exceeding thirty days; to impose a fine not exceeding one thousand dollars ($1,000.00) or sentence said offender to be confined in the jail or other place of imprisonment in the County not exceeding sixty (60) days, either one or more of said penalties. (Ga. Laws 1977, p. 3541, as amended, Ga. Laws 1978, pp. 3782, 3783).

The charter of the City of Marietta in addition to providing for a municipal court with jurisdiction over violations of the City's laws and ordinances, also provides that the city council may regulate the keeping and running at large of animals. (Ga. Laws 1977, pp. 3541, 3561). There is afforded the City Council a provision whereby the Council may adopt by reference the code of any agency of the federal or state government. (Ga. Laws 1977, pp. 3541, 3560). The grant of authority from the Georgia General Assembly has been exercised by the Marietta City Council in the City's code wherein the same states:

> The City Manager, with consent of the City Council may contract with the County for dog control within the City. This shall include the enforcement of the County 'animal control law' within the City. (City of Marietta Code § 2-4010).

This case arose when the Petitioner was charged with violating the Dog Control Ordinance of the City of Marietta. Accordingly, Petitioner was summoned to appear before the Marietta Recorder's Court, the court in which the Georgia General Assembly vested jurisdiction to enforce the laws and ordinances of the City of Marietta. When the Petitioner appeared before the Marietta Recorder's Court Petitioner requested that his case be tried before a jury as a matter of State Law, rather than by the Municipal Court Judge as set forth in the charter of Marietta. (Ga. Laws 1977, pp. 3541, 3585).

Georgia law states that violations of the animal control ordinance of Cobb County are to be tried in the State Court of Cobb County, which Court has jurisdiction "to try and dispose of all civil and

misdemeanor cases." (Ga. Laws 1974, p. 3211). In Georgia the penalty for committing a misdemeanor under State Law may be imprisonment not exceeding twelve months. Ga. Code Ann. § 27-2506. Thus, the penalty provided under State Law for a misdemeanor may be greater than the sentence that the City of Marietta may impose for violations of its laws and ordinances.

Significantly, neither the general legislation applicable to Municipal Corporations (Ga. Code Title 69) nor the charter of the City of Marietta authorized the City's Municipal Court to provide for incarceration beyond sixty days for a violation of a city law or ordinance. This sixty day maximum period of incarceration which may be imposed by a municipal court for violation of a city law or ordinance is in sharp contrast to the twelve

month period of incarceration which may be imposed by a state court for violation of a state law or statute.

Additional facts will be developed as needed for a more thorough illumination of any issue presented on this petition for certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA CORRECTLY CONCLUDED THAT THE STATE COURT OF COBB COUNTY, WHICH COURT LACKED SUBJECT MATTER JURISDICTION, ACTED PROPERLY IN REMANDING THE PRESENT CASE BACK TO THE MUNICIPAL COURT OF THE CITY OF MARIETTA FOR DISPOSITION AS THE LATTER COURT PROPERLY POSSESSED SUBJECT MATTER JURISDICTION OVER VIOLATIONS OF MUNICIPAL ORDINANCES OF THE CITY OF MARIETTA.

(i)

Under Georgia law the enforcement of the City of Marietta's Dog Control Ordinance and punishment thereunder is governed by the provisions of the City's charter rather than the penalty provisions of the Animal Control Ordinance of Cobb County, which county ordinance the City adopted by reference. (Ga. Laws 1977, p. 3541). By providing for a maximum penalty of sixty days incarceration for a violation of the laws and ordinances of the City of Marietta the Georgia General Assembly has expressly limited the period of incarceration which the Marietta Municipal Court may order, even if a federal or state ordinance adopted by reference by Marietta's City Council provides for a longer period of incarceration. (Ga. Laws 1977, pp. 3541, 3585, amended, Ga. Laws 1978, pp. 3782, 3783). Thus,

contrary to Petitioner's assertions, because the charter of the City of Marietta limits to sixty days the maximum period of incarceration to which an offender of a city ordinance may be sentenced, this Court's decisions in Baldwin v. New York, 399 U.S. 66 (1970) and Duncan v. Louisiana, 391 U.S. 161 (1968) have not been ignored by the Court of Appeals of Georgia.

Georgia courts have consistently held that the constitutional guarantee of a right to trial by jury does not extend to one charged in municipal court with the violation of a municipal ordinance. Key v. Stewart, 228 Ga. 516, 186 S.E.2d 739 (1979). As stated by the court in Pearson v. Wimbush, 124 Ga. 701, 52 S.E. 751 (1906):

> Municipal offenses are usually confined to breaches of by-laws

> and ordinances which in their nature are mala prohibita, and which by legislative sanction have been enacted by the municipality for its health, peace, and tranquility. The offenses are petty in their nature, and in this state have always been prosecuted without a jury.

The principle that the right to a trial by jury does not extend to one charged in a municipal court with violations of a municipal ordinance has also been recognized by this Court. In Duncan v. Louisiana, supra, this Court opined that petty offenses have always been held to be exempt from the Sixth Amendment's guarantee of trial by jury as:

> . . . the possible consequences to the defendant from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration

> resulting from the availability of speedy and inexpensive nonjury adjudications. Id., at 160.

However, where a conviction of an offense authorizes imprisonment for more than six months, this Court held that it cannot "be deemed 'petty' for purposes of the right to a jury trial." Baldwin, supra, at 66. Further, in Baldwin, supra, at 73, this Court determined that:

> . . . where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. Id.

As the foregoing analysis readily reveals, Petitioner's claim that he is entitled to a jury trial upon a charge of violating the municipal ordinance

involved in this instant case is totally without merit. Noting that neither the general legislation applicable to municipal corporations in Georgia (Ga. Code Title 69) nor the charter of the City of Marietta authorized the City to provide for a penalty beyond sixty days imprisonment, the State Court of Cobb County properly concluded that the City's charter "clearly limits the authority of the Municipal Judge to sentence offenders to terms far below the line drawn by the Supreme Court in Baldwin." (Petitioner's Appendix D). Accordingly, Petitioner possesses no constitutional guarantee to a trial by jury upon a charge for violating the subject municipal ordinance in this instant case.

(ii)

In addition to the lack of merit of Petitioner's position on the "issue

presented," as Petitioner has sought to frame the same, Respondent notes that under Georgia law the enforcement of the City of Marietta's Dog Control Ordinance and punishment thereunder is governed by the City's charter, not by State Law. In both Pearson v. Wimbush, 124 Ga. 701, 52 S.E. 751 (1906) and State v. Millwood, 242 Ga. 244, 248 S.E.2d 648 (1978) the Supreme Court of Georgia opined that there is a clear distinction between offenses against the laws of the state and those against the ordinances of cities. In Pearson, supra, the Supreme Court of Georgia found that while the violation of a municipal ordinance is a crime, as is the violation of a penal law of the state, the former, i.e., the violation of the municipal ordinance, cannot be punished by a sentence "similar in its nature or character to that imposed for misdemeanors against the State." Pearson, supra, at 712.

In Pearson, supra, the court placed violations of municipal ordinances in a category apart from misdemeanors, deeming the former different from violations of state law.

Of worthwhile note is the Surpeme Court of Georgia's decision in State v. Millwood, supra, wherein the court distinguished between violations of municipal ordinances and misdemeanors in finding a state statute unconstitutional insofar as it attempted to vest jurisdiction in Municipal Courts to try individuals charged with violations of State Law. In State v. Millwood, supra, the court stated that:

> . . . The only Courts with authority or judisdiction under our Constitution to try 'State cases,' or persons charged with violations of State laws are State Courts, is firmly established by the previous decisions of this Court. (Cites omitted). Id., at 246.

In this instant case the Petitioner was charged with violating a municipal ordinance, not a state statute. Accordingly because the Petitioner was not charged with violation of a state statute the State Court of Cobb County lacked subject matter jurisdiction. Noting its lack of subject matter jurisdiction the State Court of Cobb County properly remanded this matter back to the Municipal Court of Marietta for disposition as that court properly held subject matter jurisdiction over alleged violations of the City's charter.

As is readily revealed by the foregoing analysis, the Court of Appeals of Georgia properly opined that the State Court correctly remanded this instant case back to the Municipal Court of Marietta as:

> The enforcement of the ordinance and punishment

> thereunder is governed by the provisions of the City charter and the Municipal Court is the proper forum for the adjudication of this issue.

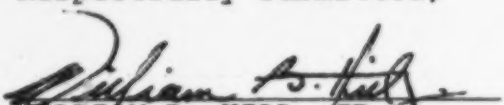
Accordingly, Respondent's contentions to the contrary here on this instant petition for a writ of certiorari are simply without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrably in accord with

the applicable decisions of this Court, is soundly based upon a proper construction of state law.

Respectfully submitted,

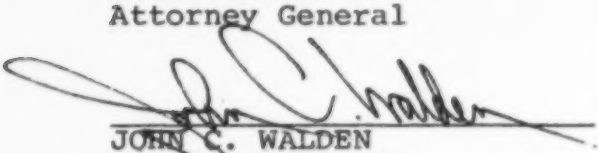


WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel of Record for the
Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3356

CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in opposition upon the Petitioner's attorney by depositing a copy of this brief in the United States mail with proper address and adequate postage to:

Mr. Sammy J. Hawkins
Suite 577, FNB Building
100 Cherokee Street
Marietta, Georgia 30060

This 24th day of June, 1982.

WILLIAM B. HILL, JR.